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SOAH DOCKET NO. 473-21-0538  
DOCKET NO. 51415

APPLICATION OF SOUTHWESTERN § BEFORE THE STATE OFFICE  
ELECTRIC POWER COMPANY FOR § OF  
AUTHORITY TO CHANGE RATES § ADMINISTRATIVE HEARINGS

**SOUTHWESTERN ELECTRIC POWER COMPANY'S  
RESPONSE TO SIERRA CLUB'S MOTION TO COMPEL**

Southwestern Electric Power Company (SWEPCO) requests the Administrative Law Judges (ALJs) deny Sierra Club's Motion to Compel Responses to its Seventh Set of Requests for Information (RFIs).<sup>1</sup> Specifically, Sierra Club RFIs 7.1, 7.3, and 7.13, seek irrelevant information that is not calculated to lead to the discovery of admissible evidence in this proceeding and pertain to the issue determined to be beyond the scope of this proceeding in SOAH Order No. 7.<sup>2</sup>

**I. INTRODUCTION**

Sierra Club has sought to challenge the prudence of SWEPCO's decision to retrofit its Flint Creek plant for continued operations in compliance with the Coal Combustion Residuals (CCR) and Effluent Limitations Guidelines (ELG). That issue is not ripe for consideration in this proceeding as no capital investments or costs related to the Flint Creek CCR/ELG retrofit are being reviewed for recovery in this case—any such costs will be reviewable when SWEPCO seeks to include them in rate base. For that reason, SWEPCO moved to strike the portion of Sierra Club witness Devi Glick's testimony that addressed Sierra Club's premature prudence challenge concerning the Flint Creek CCR/ELG retrofit.<sup>3</sup> As explained in SOAH Order No. 7, Ms. Glick's

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<sup>1</sup> Pursuant to SOAH Order No. 2, this response is timely filed.

<sup>2</sup> See SOAH Order No. 7 (Apr. 27, 2021).

<sup>3</sup> Southwestern Electric Power Company's Objection and Motion to Strike the Testimony of Devi Glick on Behalf of Sierra Club (Apr. 9, 2021).

testimony on the issue is not relevant to this proceeding because the decision to retrofit Flint Creek was made after the conclusion of the historical test year and the costs associated with that decision are not being reviewed for recovery in this case.<sup>4</sup>

On April 27, 2021, the ALJs granted SWEPCO's motion to strike, excluding the portion of testimony relating to this issue. Nevertheless, Sierra Club continues to seek discovery on this particular subject.<sup>5</sup> Sierra Club now contends a "factual dispute" remains "about whether the Company has included in Texas customers' rates at least one dollar of the CCR/ELG costs that it incurred before and during the test year" and that the information sought is relevant to "when the spending for CCR/ELG projects started, how much was spent, and the amount of costs at issue for the test year in this case."<sup>6</sup> Ultimately, Sierra Club continues to assert without basis that SWEPCO proposes to include these costs in rates in this case.<sup>7</sup> Sierra Club also states these RFIs are based on SWEPCO having filed rebuttal testimony to address and refute Sierra Club's contentions concerning the Flint Creek retrofit.<sup>8</sup> That testimony is located at Section IV of Mark A. Becker's rebuttal testimony. Significantly, as SWEPCO has previously explained, consistent with SOAH Order No. 7, SWEPCO does not intend to offer Section IV of Mr. Becker's testimony into evidence at the hearing.<sup>9</sup> Nonetheless, Sierra Club continues to conduct discovery on impertinent discovery

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<sup>4</sup> SOAH Order No. 7, at 6 (granting SWEPCO's objection and motion to strike Section 5 of Devi Glick's testimony).

<sup>5</sup> See, e.g., Sierra Club's Sixth Set of Requests for Information (Apr. 29, 2021); Sierra Club's Seventh Set of Requests for Information (May 5, 2021).

<sup>6</sup> Motion to Compel at 3.

<sup>7</sup> Motion to Compel at 4.

<sup>8</sup> Motion to Compel at 2.

<sup>9</sup> Section IV starts on page 9 of Mr. Becker's rebuttal testimony and goes through page 13.

matters based on its own assessment that Order No. 7 is erroneous.<sup>10</sup> Accordingly, this motion to compel discovery responses should be denied.

## **II. RESPONSE TO MOTION TO COMPEL**

Although the scope of discovery in Commission proceedings is broad, requests must show a reasonable expectation of obtaining information that will aid in the dispute's resolution.<sup>11</sup> The Commission's rules define the scope of permissible discovery: "Parties may obtain discovery regarding any matter, not privileged or exempted under the Texas Rules of Civil Evidence, the Texas Rules of Civil Procedure, or other law or rule, *that is relevant to the subject matter in the proceeding.*"<sup>12</sup> In evaluating whether information is relevant to the subject matter of a proceeding, it must be determined whether the information "has any tendency to make a fact more or less probable than it would be" without the information and that "fact is of consequence in determining the action."<sup>13</sup> SWEPCO objected to Sierra Club RFI Nos. 7.1, 7.3, and 7.13 because they seek information that is irrelevant, outside the scope of permissible discovery, and will not aid in the resolution of matters in this case. Furthermore, Sierra Club is actively ignoring the fact that the scope of this proceeding and the recovery sought by SWEPCO, as the applicant in this base rate case, does not include capital projects or costs associated with the decision to retrofit Flint Creek to comply with CCR/ELG guidelines.

The RFIs at issue pertain to rebuttal testimony from Mr. Becker that is explicitly identified as responding to the section of Ms. Glick's testimony that was struck in this proceeding pursuant

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<sup>10</sup> Motion to Compel at 3 (stating "the ALJs erroneously decided that CCR/ELG costs are 'not being reviewed for recovery in this case'").

<sup>11</sup> *In re Nat'l Lloyd's Ins. Co.*, 532 S.W.3d 794, 808 (Tex. 2017) (quoting *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding)).

<sup>12</sup> 16 Tex. Admin. Code § 22.141(a) (emphasis added).

<sup>13</sup> Tex. R. Evid. 401.



to SOAH Order No. 7.<sup>14</sup> Sierra Club candidly acknowledges this much in its motion. “Sierra Club submitted its Seventh Set of RFIs to the Company seeking information directly related to the Flint Creek retrofit analyses described in Company witness Becker’s Rebuttal Testimony.”<sup>15</sup>

The information sought in Sierra Club 7.1 expressly concerns communications regarding “the evaluation or decision to retrofit Flint Creek and all Capital Improvement Approval Requisitions for the CCR or ELG projects.” Such information is not relevant as the decision to retrofit Flint Creek was made after the conclusion of the historical test year in this case and costs associated with that decision are not being reviewed for recovery in this case. Similarly, Sierra Club 7.3 requests information regarding “CCR capital expenditures in the years they were incurred for the CCR and ELG projects.” Sierra Club 7.13 also requests information regarding CCR/ELG costs. Through these RFIs, Sierra Club also seeks information concerning the Flint Creek retrofit and associated project costs that are not related to SWEPCO’s request for relief in this case and that are beyond the scope of this proceeding.

Sierra Club, however, argues in its motion that these requests seek to obtain information “relevant to the timing, amount, prudence, and public’s interest related to ‘any’ of SWEPCO’s capital expenditures.”<sup>16</sup> This argument is based on a flawed assumption that review of capital expenditures in a rate case includes not only those amounts and expenditures for which SWEPCO seeks recovery but also any capital investments regardless of whether or not they are included in the Company’s requests for relief. Sierra Club also argues that its requests are relevant to the “total cost” of operating Flint Creek and “whether SWEPCO’s ongoing test-year spending at Flint

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<sup>14</sup> SOAH Order No. 7, at 6. Each of these requests identify by page number discussion concerning Section IV of Mr. Becker’s testimony.

<sup>15</sup> Motion to Compel at 2.

<sup>16</sup> Motion to Compel at 5.

Creek . . . and other capital expenditures, are reasonable and necessary.”<sup>17</sup> But the requests only seek information regarding CCR/ELG project costs not being reviewed in this case and other information directed to the prudence of the Company’s decision to retrofit Flint Creek and the analyses it undertook to make that decision. As the test year applicable to this proceeding ended March 31, 2020, it is unclear what Sierra Club means by “ongoing test year spending.”

As SWEPCO has explained, the investment projects related to the Flint Creek CCR/ELG retrofit were not placed in service before the end of the test year. As Sierra Club’s RFIs only attempt to develop information regarding the prudence of the Flint Creek retrofit and the analyses related to the Company’s decision on the issue, that information remains beyond the scope of this proceeding. These requests seek information that does not bear on a fact of consequence in this case. Simply put, the information sought is not intended to aid the resolution of any matter at issue in this case. Accordingly, as SWEPCO explained in its objections, these requests are not reasonably calculated to lead to the discovery of admissible evidence.<sup>18</sup>

### **III. CONCLUSION**

For the foregoing reasons, SWEPCO respectfully requests that the ALJs deny Sierra Club’s motion to compel responses concerning Sierra Club’s Seventh Set of RFIs. SWEPCO further requests any other relief to which it may be justly entitled.

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<sup>17</sup> *Id.* at 6.

<sup>18</sup> Tex. R. Civ. Proc. 192.3(a).

Respectfully submitted,

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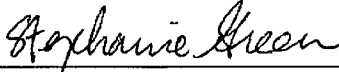
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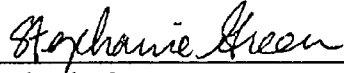
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**CERTIFICATE OF SERVICE**

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on May 19, 2021, in accordance with the Second Order Suspending Rules issued in Project No. 50664 and Order No. 1 in this matter.

  
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Stephanie Green